

The Successor Trustee's Duties



In our experience, most people named as a Successor trustee of a trust are not professionals. In other words, the role of trustee is typically filled by a family member, either a spouse or a child, or a trusted friend. As a non-professional trustee, most people who are nominated have very little idea of what is expected of them, or of the liability they take on by agreeing to act as trustee. We've prepared this article to assist those who are either currently serving or have been nominated to serve as successor trustee.

NOTE: This article is not applicable to a person serving as trustee of a trust which he or she created.

A. GENERAL DUTIES OF A TRUSTEE

A trustee stands in a special relationship of fiduciary responsibility to the creator of the trust and to the beneficiaries. In carrying out his or her fiduciary duties, the trustee must be mindful of that unique relationship. The starting point is the trust instrument and its specification of what the trustee is to do to accomplish the purposes for which the trust has been established. For example, in the case of the simplest trust disposition, the instrument might state that the trustee is to (1) hold and invest the assets; (2) pay net income to a beneficiary for life; and then (3) distribute the remainder to a beneficiary. The emphasis on a particular duty may depend on the purpose for which the trust was created. The rest of this article discusses a successor trustee's typical duties.

1. Duty to Administer Trust by Its Terms.

The trustee is obligated to administer the trust strictly by its terms. The trustee must be guided in all acts by the trust instrument, including any amendments. Unless there is an absence of direction or ambiguity, the trustee's actions are limited by the intent apparent from the face of the trust instrument. Therefore, it is critical that the trustee read and understand the entire trust document. To the extent the trustee needs guidance in interpreting the terms of the trust, he or she should seek advice from an attorney in our office.

2. Duty of Skill and Care.

California requires that a trustee administer the trust with the care, skill, prudence and diligence that a person familiar with the job of serving as a trustee would use in the conduct of the trust's activities to accomplish the purposes of the trust.

3. Duty to Give Notices.

The trustee must read the trust carefully to determine the circumstances in which he or she is required to give notice to beneficiaries, co-trustees and successor trustees. California law also contains notice provisions with which the successor trustee must comply.

4. Duty to Furnish Information and to Communicate.

The trustee has the duty to keep the beneficiaries informed regarding the trust and its administration. The trustee should provide the beneficiaries with information about the assets of the trust and the trust's investment performance, and should provide each beneficiary with other information about the trustee's acts and the administration of the trust that is relevant to the beneficiary's interest. The trustee also should provide any additional information reasonably requested by the beneficiary.

5. Duty to account.

California requires that the trustee periodically provide the current trust beneficiaries with a written accounting of the assets, liabilities, receipts, and disbursements of the trust.

6. Duty Not to Delegate.

Generally, the trustee has a duty not to delegate to others the performance of any acts the trustee can reasonably be expected to perform personally, particularly acts involving the exercise of judgment and discretion. The trustee should keep records documenting the basis for any significant decision. The trustee may employ others, such as attorneys, accountants and investment advisors, to advise or assist in the performance of administrative duties. The trustee may not, however, blindly follow their advice.

7. Duty of Loyalty.

The trustee is obligated to administer the trust solely in the interests of the beneficiaries. The trustee may not engage in any act that puts his or her personal interests in conflict with those of any of the beneficiaries.

8. Duty to Avoid Conflict of Interest.

The trustee has a duty not to use trust property for his or her personal gain or for any other purpose unconnected with the trust, nor to take part in any transaction in which the trustee has an interest adverse to a beneficiary. In general, the trustee may not use trust assets in any manner that benefits the trustee personally, even if there is no loss to the trust. The trustee should consult with an attorney regarding any proposed transactions which the trustee suspects might violate this rule.

9. Duty to Segregate Trust Property.

The trustee has a strict duty not to commingle personal funds or other non-trust assets with the property of the trust. Trust property must be separate at all times from the trustee's personal funds.

10. Duty of Impartiality.

The trustee has a primary duty to treat the beneficiaries impartially, unless otherwise specifically provided in the trust instrument. That means that the trustee must show impartiality in balancing the interests of lifetime beneficiaries with those of remainder beneficiaries, and in balancing the interests of members of the same class. The trustee must also balance the interests of lifetime and remainder beneficiaries when making investment and discretionary distribution decisions.

11. Duty to Invest.

The trustee has the duty to invest trust assets in a manner which is appropriate for the trust. Unless otherwise required by the trust instrument, the trustee will generally have a duty to diversify investments and determine an appropriate asset allocation program. That duty begins as soon as the initial assets are received by the trustee. The trustee should become familiar with any specific investment directions given in the trust, and must know the investment directions and restrictions under governing state law. An overall concept to keep in mind is that a trustee must be prudent in his or her handling of trust investments. This requires that the trustee determine the financial needs and risk tolerance of the beneficiaries in establishing the investment objectives and program for the trust.

12. Duty to Enforce and Defend Claims.

The trustee has a duty to take reasonable steps to enforce claims on behalf of the trust and to defend the trust against adverse claims. In deciding whether to enforce a claim, or defend the trust against a claim, the trustee should consider the economic realities of the situation. If the costs of enforcing or defending a claim outweigh the potential benefit to the trust, the trustee may be well advised to settle or abandon the claim. A successor trustee may be obliged to examine the acts of a prior trustee to determine if a possible claim exists in favor of the trust.

13. Duty of Confidentiality.

The trustee should keep the affairs of the trust confidential, unless otherwise required by law. For example, the trustee should not disclose the terms of the trust, the identity and interests of the beneficiaries or the nature of the trust assets to anyone who is not a beneficiary of the trust or who does not need this information to assist in the administration of the trust. In addition, the trustee should keep confidential any personal information he or she has learned about the beneficiaries through serving as trustee.

B. YOUR LIABILITIES IN THE EVENT OF A BREACH

If you are found to have breached any of these duties (which is also sometimes referred to as a “breach of trust”), a beneficiary can file a lawsuit seeking:

1. To Compel You to Perform Your Duties.

This is nothing more than asking a court to make you do what you were supposed to have done in the first place.

2. To Enjoin You from Committing a Breach of Trust.

If it was known that you were about to breach one of your duties, a beneficiary can ask a court to order that you not do so.

3. To Compel You to Redress a Breach of Trust.

In other words, if it is shown that you have breached one of your duties, to take corrective action which would potentially include making the trust whole for any damages suffered. If you commit a breach of trust, you are chargeable with any loss or reduction in value of trust property resulting from the breach of trust, as well as any profit made by you through a breach of trust.

4. To Require an Accounting.

A court may order that you account for your actions to determine the severity of any breach that may have occurred.

5. To Remove You as Trustee.

Before you can be removed as a trustee, you must be shown to have breached your duties as a trustee. Alternatives to your removal include the appointment of a special trustee to act in your place until a decision can be made about your removal, or you may be suspended.

6. To Reduce or Deny You Compensation.

In the event of a breach of the trust, a court may reduce your compensation or deny it entirely, depending on the severity of the breach.

C. YOUR DEFENSES

There are several defenses available to a trustee charged with a breach of the trust. They include:

1. Beneficiary was Given Notice.

Generally, a beneficiary may not sue a trustee for a breach of the trust more than three (3) years after being provided with a copy of the trust accounting. This limitation only further emphasizes the need to account to trust beneficiaries at least annually to prevent suits for events that occurred many years before.

2. Reasonable Reliance on Trust Instrument.

A trustee who reasonably relies on the terms of the trust is not liable to a beneficiary for a breach of the trust to the extent the breach results from the reliance. This pivotal issue with this defense will be the reasonableness of your reliance. You will not be held liable for payments made in good faith where you had no notice of a beneficiary's incapacity, birth, marriage or death or other event in which event a beneficiary's interest may have been affected

3. Beneficiary Consent or Ratification.

A trustee is not liable to a beneficiary for a breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability of the breach, or ratified the transaction constituting the breach.

4. Exoneration.

The trust may specifically provide that you will not be held responsible to any successor Trustee for accounting or records unless there is clear and convincing evidence of willful bad faith. The trust agreement also may direct that you will not be held liable for any error of judgment, mistake of law, or action or inaction of any kind in connection with the administration of any trust created under the trust unless there is clear and convincing evidence of willful bad faith. In these instances, you will be allowed to use the trust assets to defend any claim brought against you.

D. MISCELLANEOUS

There are a few additional matters of which you need to be aware:

1. Accountability for Profits in the Absence of a Breach of Trust.

You are accountable for any profit made by you, even if the profit does not result from a breach of trust. If you enter into a transaction intending to make a profit and there is no breach of trust, you nevertheless may not retain the profit for yourself.

2. No Liability for Loss in the Absence of a Breach of Trust.

You generally are not liable to the beneficiaries for a loss or depreciation in value of trust property, or for a failure to make a profit, if the loss or failure to make a profit did not result from a breach of trust.

3. Compensation.

You can take a fair and reasonable compensation for your services provided as a fiduciary and for any additional services provided beyond the scope of your regular duties.

Again, this list of duties is not meant to be exhaustive and this article is not intended to constitute legal advice. If you have any questions or do not understand any aspect of these duties, please give us a call.



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Matthew S. Crider, a partner in the law firm of Crider Law Group, has been a lawyer since 1996, and has helped numerous Californians navigate the treacherous waters of estate & trust administration. He is effective because he is informed, knowledgeable, and current.

Every year, Matthew spends countless weeks in conference halls, listening to and learning from the greatest legal minds from around the country. He absorbs the best advice, identifies the strongest tactics and the most convincing arguments, and then adapts them to his clients' needs.

“Learning never ends – the law changes every day, and my job is to make sure I’m on top of new developments. If I don’t know about a new legal development it could cost my client their case – and that’s just not acceptable.”